

DRAFT BOARD ORDER/STAFF RECOMMENDATION

IN THE MATTER OF

STATE OF MAINE, ACTING THROUGH THE	)	APPEAL OF SOLID WASTE
STATE PLANNING OFFICE	)	LICENSE
OLD TOWN, PENOBSCOT COUNTY, MAINE	)	FINDINGS OF FACT
TREATED BIOMEDICAL WASTE	)	AND ORDER
#S-020700-WU-AJ-N	)	(DENIAL)

Pursuant to the provisions of the *Maine Hazardous Waste, Septage and Solid Waste Management Act*, 38 M.R.S.A. §§1301 to 1319-Y and 06-096 CMR 2 *Rules Concerning the Processing of Applications and Other Administrative Matters* (last amended April 1, 2003), 06-096 CMR 400 *Solid Waste Management Rules: General Provisions*, (last amended July 20, 2010), 06-096 CMR 401 *Solid Waste Management Rules: Landfill Siting, Design and Operation*, (last amended July 20, 2010), 06-096 CMR 405 *Solid Waste Management Rules: Water Quality Monitoring, Leachate Monitoring, and Waste Characterization*, (last amended June 16, 2006) and 06-096 CMR 900 *Biomedical Waste Management Rules* (last amended August 4, 2008), the Board of Environmental Protection ("Board") has considered the appeals filed by Mary Dolan, Ed Spencer, Chuck Leithiser and the Juniper Ridge Landfill Advisory Committee (appellants) of the Department's approval of the above-noted license application. Based upon materials in the Department's file, the Board finds the following facts:

1. DESCRIPTION

On June 30, 2010, the Department issued Order #S-020700-WU-AJ-N which approved, with conditions, the request by the State Planning Office to dispose of up to 5,000 tons per year of treated biomedical waste at the Juniper Ridge Landfill. The treated biomedical waste is generated by the Associated Health Resources, Inc. (AHR) facility located in Pittsfield, Maine. AHR treats biomedical waste from hospitals, laboratories, medical practices, dentists and veterinary practices located both in-state and out-of-state. In the course of reviewing the application, the Department took into consideration the volume of waste proposed for disposal, the process by which the waste is generated, proper waste handling procedures and whether this waste is "waste generated within the State" as defined in 38 M.R.S.A. §1310-N(11). The Department received comments from interested persons on these same issues.

On July 28, 2010, Mary Dolan, Edward Spencer and Charles Leithiser submitted a timely appeal of the Commissioner's license approval, requesting that the Board vacate the Department's approval of the application, or, that the approval reflect the percentage of in-state waste received by the AHR facility, that every load of treated waste be tested and that the disposal location of the treated waste be accurately mapped within the landfill. In

STATE OF MAINE, ACTING THROUGH THE	2	APPEAL OF SOLID WASTE
STATE PLANNING OFFICE	)	LICENSE
OLD TOWN, PENOBSCOT COUNTY, MAINE	)	FINDINGS OF FACT
TREATED BIOMEDICAL WASTE	)	AND ORDER
#S-020700-WU-AJ-N	)	(DENIAL)

277

requesting these remedies, the appellants believe the Department erred in determining that all the treated waste generated by the AHR facility is “waste generated within the State”, the volume of waste proposed for disposal is excessive and bringing biomedical waste to the landfill poses serious health and safety risks not adequately addressed by the Department.

On July 30, 2010, the Juniper Ridge Landfill Advisory Committee submitted a timely appeal of the Commissioner’s license approval, requesting that the Board amend the approval to limit the amount accepted to disposal to 3,000 tons per year. In requesting this remedy, the appellant believes the Department erred in determining that all the treated waste generated by the AHR facility is “waste generated within the State” and that the volume of waste proposed for disposal is excessive.

2. PROCEDURAL HISTORY

- A. As originally approved on May 20, 2005 [Department Order #O-221-BD-A-N], the Associated Health Resources, Inc. facility was licensed to treat approximately 1,500 tons of biomedical waste annually. Concurrent with that license, on June 20, 2005 Department Order #S-01987-WU-NB-N approved the disposal of approximately 2,000 tons of “processed biomedical waste” at the Pine Tree Landfill in Hampden, Maine.
- B. As approved on July 2, 2009 [Department Order #O-221-BD-B-M], the AHR facility made significant changes to its facility such that the facility could treat up to 7,000 tons of biomedical waste annually.
- C. On October 13, 2009, the State Planning Office filed an ongoing special waste application for the disposal of 5,000 tons annually of treated biomedical waste, generated by the AHR facility, at the Juniper Ridge Landfill.
- D. On December 31, 2009, the Pine Tree Landfill ceased accepting waste at the Hampden landfill, including the treated biomedical waste approved under Department Order #S-01987-WU-NB-N.
- E. Department staff attended the November 16, 2009 and December 10, 2009 meetings held by the Juniper Ridge Landfill Advisory Committee to discuss the pending special waste application for the disposal of treated biomedical waste from the AHR facility at the Juniper Ridge Landfill.
- F. As of November 17, 2009, the Department had received two requests for the Department to hold a public hearing on the pending special waste application. On December 4, 2009, having concluded that the concerns raised by the parties could be

276

STATE OF MAINE, ACTING THROUGH THE	3	APPEAL OF SOLID WASTE
STATE PLANNING OFFICE	)	LICENSE
OLD TOWN, PENOBSCOT COUNTY, MAINE	)	FINDINGS OF FACT
TREATED BIOMEDICAL WASTE	)	AND ORDER
#S-020700-WU-AJ-N	)	(DENIAL)

addressed during the normal course of reviewing the application, the Commissioner denied the requests for a public hearing on the application.

- G. Between November 16, 2009 and December 28, 2009, the Department received ten letters from interested parties, including Ed and Cheryl Spencer, Mary Dolan, the City of Old Town, the Juniper Ridge Landfill Advisory Committee, Paul Schroeder, the Penobscot Indian Nation, Chuck Leithiser and Claudia Tucci.
- H. On December 30, 2009, Department Order #S-10735-WT-WZ-N, approved the disposal of treated biomedical waste from the AHR facility at the Waste Management landfill for the period from January 1, 2010 to June 30, 2010.
- I. On April 26, 2010, Waste Management Disposal Services of Maine submitted an ongoing special waste disposal application for treated biomedical waste generated by the AHR facility. That application is still pending with the Department.
- J. On June 21, 2010, a draft copy of Department Order #S-020700-WU-AJ-N was made available to the interested parties, notifying the parties that the Department intended to take final action on the application by June 29, 2010. The subject Order (Department Order #S-020700-WU-AJ-N) was signed by the Commissioner and filed with the Board on June 30, 2010.
- K. On June 30, 2010, the Department issued Order #S-20700-WU-AJ-N, which approved the disposal of approximately 5,000 tons per year of treated biomedical waste generated by the AHR, Inc facility located in Pittsfield, Maine.
- L. On July 28, 2010, Mary Dolan, Edward Spencer and Charles Leithiser submitted a timely appeal of the Commissioner's license approval. On July 30, 2010, the Juniper Ridge Landfill Advisory Committee also submitted a timely appeal of the Commissioner's license approval. The appeal of Dolan, Spenser and Leithiser included three documents not already considered part of the Department's record of the application.
- M. On September 27, 2010, Board Chair Susan Lessard ruled that the three documents were inadmissible and that the two appeals would be consolidated under one proceeding.
- N. In separate letters dated August 30, 2010 and October 18, 2010, the applicant and its agent responded to the points brought forth by appellants Mary Dolan, Ed Spencer and Chuck Leithiser and the Juniper Ridge Landfill Advisory Committee, respectively.

DRAFT

STATE OF MAINE, ACTING THROUGH THE	4	APPEAL OF SOLID WASTE
STATE PLANNING OFFICE	)	LICENSE
OLD TOWN, PENOBSCOT COUNTY, MAINE	)	FINDINGS OF FACT
TREATED BIOMEDICAL WASTE	)	AND ORDER
#S-020700-WU-AJ-N	)	(DENIAL)

279

3. STANDING

The Juniper Ridge Advisory Committee was created pursuant to Resolves 2003, ch. 93 ("Chapter 93"). The municipal officers of the City of Old Town and the Town of Alton selected 7 members of the Committee, to include a local health officer; a municipal officer; and at least 3 additional residents of the municipality, including abutting property owners and residents potentially affected by pollution from the facility. 38 M.R.S. § 2171(1). Among the express statutory purposes of the Committee is to "[s]erve as a liaison between the community and the project developer or the commissioner to facilitate communications during the development and operation of the facility." *Id.* § 2171(3)(D). The Committee is in effect a legally constituted representative of the affected municipalities on matters relating to the Juniper Ridge Landfill.

The courts have broadly construed the standing of a municipality to bring an action or an appeal which affects its residents. Furthermore, it is consistent with Chapter 93 for the Juniper Ridge Advisory Committee to be accorded the same standing which would be accorded to either of the impacted municipalities.

For all of these reasons, the Board finds that the Juniper Ridge Advisory Committee may suffer a particularized injury as a result of the licensing decision, and therefore qualifies as an "aggrieved person" with standing to bring this appeal before the Board pursuant to Chapter 2, Section 1(B).

Given that the two appeals are consolidated and contain similar objections, the Board declines to address the standing of appellants Dolan, Spencer and Leithiser.

4. BASIS FOR THE APPEAL OF THE DEPARTMENT LICENSE

The appellants contend the following:

- A. The amount of processed biomedical waste approved for disposal is excessive and is not supported by information supplied by the generator and the applicant;
- B. Waste handling procedures necessary to offset the serious health and safety risks associated with this waste have not been adequately addressed by the Department; and
- C. All or a portion of the treated biomedical waste is not waste generated within the State and therefore cannot be disposed of in the Juniper Ridge Landfill.

5. RESPONSE TO THE APPEAL:

- A. Amount of processed biomedical waste approved for disposal is excessive:

260

STATE OF MAINE, ACTING THROUGH THE	5	APPEAL OF SOLID WASTE
STATE PLANNING OFFICE	)	LICENSE
OLD TOWN, PENOBSCOT COUNTY, MAINE	)	FINDINGS OF FACT
TREATED BIOMEDICAL WASTE	)	AND ORDER
#S-020700-WU-AJ-N	)	(DENIAL)

Appellants Objection: As originally approved on May 20, 2005 [Department Order #O-221-BD-A-N], the AHR facility was licensed to treat approximately 1,500 tons of biomedical waste annually. Concurrent with that license, Department Order #S-01987-WU-NB-N approved the disposal of approximately 2,000 tons of “processed biomedical waste” at the Pine Tree Landfill in Hampden, Maine. The AHR facility made significant changes to its facility in 2009 [Department Order #O-221-BD-B-M] such that the facility could treat as much as 7,000 tons annually.

The appellants state that the volume of treated waste disposed of at the Pine Tree Landfill has never exceeded 2,000 tons, as approved in Department Order #S-01987-WU-NB-N, that there is no foundation to anticipate an increase in the amount of treated waste generated by the AHR facility and, in fact, the amount of waste may decrease through recycling, that the generator has supplied unreliable data on the current output of the facility, and that giving priority to landfilling the treated waste violates the standards set forth in Maine’s Solid Waste Management Hierarchy [38 MRSA §2101].

Specifically, data provided by the generator on November 16, 2009 equated to 680 tons per year of treated waste being produced. On December 10, 2009, the generator and applicant provided significantly different tonnages [3,090 tons per year] but were unclear as whether the new tonnages reflected past quantities or future projections. However, the new numbers were still below the 5,000 tons requested in the application. Even in the event of a pandemic outbreak, other emergency plans and measures already developed by government agencies would mitigate the generation of increased volumes of biomedical waste and the need to dispose of treated biomedical waste generated by AHR. Finally, the generator and the landfill should undertake more effort to reduce, reuse and recycle, thereby minimizing the amount of biomedical waste treated by the facility.

Board Response: The Board finds that actual generation data provided by the generator and on record with the Department ranges from 2,700 to 3,090 tons annually and acknowledges that generation rates may vary, depending on the size and number of facilities that may elect to ship wastes to the AHR facility for treatment. The Board further finds that the disposal limit of 5,000 tons per year approved in the Order is below the maximum potential output of the generator [7,000 tons per year], while allowing for further growth of the facility in the future, including potentially accommodating the increase in the generation of biomedical waste resulting from a pandemic outbreak.

Finally, the Board finds that unprocessed biomedical waste is not a “solid waste” that is appropriately considered within the context of the waste management hierarchy

281

STATE OF MAINE, ACTING THROUGH THE	6	APPEAL OF SOLID WASTE
STATE PLANNING OFFICE	)	LICENSE
OLD TOWN, PENOBSCOT COUNTY, MAINE	)	FINDINGS OF FACT
TREATED BIOMEDICAL WASTE	)	AND ORDER
#S-020700-WU-AJ-N	)	(DENIAL)

since safe treatment, handling and disposal options are very limited. The Board further finds that treated biomedical waste is, by rule, designated a "special waste", and that due to its nature is most appropriately managed by landfilling.

- B. Waste handling procedures necessary to offset the serious health and safety risks associated with this waste have not been adequately addressed:

Appellants Objection: The appellants assert that transporting, treating and disposing biomedical waste is dangerous and poses a significant risk to public health and the environment. Given the past violations at the AHR facility that may have resulted in ineffective treatment of wastes and the serious consequences of ineffective treatment of biomedical waste to the health of the people of Maine, more frequent efficacy testing at the point of generation is necessary. Further, detailed mapping of the disposal location of the treated waste within the Juniper Ridge Landfill is necessary to minimize worker exposure to the treated waste and sharps present in the waste.

Board Response: The Board finds that proper transportation, handling and treatment of the untreated biomedical waste has been addressed by the generator in accordance with the provisions of 06-096 CMR 900 and in Department Orders #O-221-BD-A-N and #O-221-BD-B-M. The monthly efficacy testing conducted by the generator has been found adequate to demonstrate that the facility has achieved the inactivation of vegetative bacteria, fungi, lipophilic/hydrophilic viruses, parasites, and mycobacteria at a 99.9999% reduction or greater; and inactivation of *Bacillus stearothermophilus* spores and *Bacillus subtilis* spores at a 99.99% reduction or greater in the treated waste. The Board further finds that, in accordance with Section 5 and Special Condition #4 of Department Order #S-20700-WU-AJ-N, the applicant has made adequate provisions for minimizing exposure of workers to the treated waste through training, by placing waste where future excavation is not expected, and by covering the waste immediately upon placement.

- C. All or a portion of the treated waste is out-of-state waste and cannot be disposed of at the Juniper Ridge Landfill:

Appellants Objection: The appellants state that Department Order #S-20700-WD-N-A, the Operating Services Agreement between the State Planning Office, and 38 MRSA §1310-N(11) all prohibit the disposal of waste not generated within the State at the Juniper Ridge Landfill. Specifically, 38 MRSA §1310-N(11) states, "Consistent with the Legislature's findings in section 1302, a solid waste disposal facility owned by the State may not be licensed to accept waste that is not waste generated within the State. For purposes of this subsection, "waste generated within the State" includes: residue and bypass generated by incineration, processing and recycling facilities within the State or waste, whether generated within the State or

282

STATE OF MAINE, ACTING THROUGH THE	7	APPEAL OF SOLID WASTE
STATE PLANNING OFFICE	)	LICENSE
OLD TOWN, PENOBSCOT COUNTY, MAINE	)	FINDINGS OF FACT
TREATED BIOMEDICAL WASTE	)	AND ORDER
#S-020700-WU-AJ-N	)	(DENIAL)

outside of the State, if it is used for daily cover, frost protection or stability or is generated within 30 miles of the solid waste disposal facility.”

The appellants contend that the “treatment” of waste by the AHR facility is not equivalent to “processing”. Further, the appellants state that due to the different and distinct problems associated with solid waste and biomedical waste, there are different and distinct regulatory regimes for these two ways of handling solid waste and biomedical waste. This separation and distinction directly contradicts the Department’s finding that processing and treatment are synonymous. Additionally, the designation of treated biomedical waste as “special waste” does not, by default, allow its disposal at the Juniper Ridge Landfill nor support the Department’s finding that all the waste from the AHR facility is in-state waste. In fact, since the AHR facility is neither an incinerator, nor processing or recycling facility, none of the residue or bypass resulting from out-of-state waste should be disposed of at the Juniper Ridge Landfill. Since AHR accepts waste from out-of-state generators for treatment, not processing, the treated waste is not waste generated in Maine and should not be permitted to be disposed of at the Juniper Ridge Landfill.

At the very least, only the Maine portion of the waste is waste generated in Maine and may be eligible for disposal at the Juniper Ridge Landfill. The Order should be revised to reflect this fact, either limiting the disposal amount to 3,000 tons annually [see Landfill Advisory Committee appeal] or as a percentage of the in-state waste received by the AHR facility (34.9% of the total waste) [see appeal of Dolan, Spencer and Leithiser].

The Juniper Ridge Landfill Committee contends that limiting disposal of the treated waste to only that portion of in-state waste accepted by the AHR facility would not violate the Interstate Commerce Clause. AHR is free to treat biomedical waste from both in-state and out-of-state sources, but the appellant contends that the applicant is restricted from disposing of the out-of-state portion of the waste at the Juniper Ridge Landfill. The treated waste from out-of-state sources could be returned to the original generators or disposed of at another facility licensed to accept this waste, such as the Waste Management landfill in Norridgewock

The appellants state that there is no need to dispose of the treated waste at the Juniper Ridge Landfill, as the Waste Management Landfill in Norridgewock is currently licensed to accept this waste. The AHR facility is closer to the Waste Management Landfill, reducing transportation costs and minimizing potential exposure to the public of the treated waste.

DRAFT

STATE OF MAINE, ACTING THROUGH THE	8	APPEAL OF SOLID WASTE
STATE PLANNING OFFICE	)	LICENSE
OLD TOWN, PENOBSCOT COUNTY, MAINE)	FINDINGS OF FACT
TREATED BIOMEDICAL WASTE)	AND ORDER
#S-020700-WU-AJ-N)	(DENIAL)

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Finally, the appellants contend that the Department's decision to allow treated waste to the Juniper Ridge Landfill may have been rushed, as the six-month contract with the Waste Management Landfill expired June 30, 2010.

Board Response: The Board finds that the Department has correctly applied the definition of "waste generated within the State" as defined in 38 MRSA §1310-N(11). Specifically, the Department found that 38 MRSA §1310-N(11) defines "waste generated within the State" to include "...residue and bypass generated by incineration, processing and recycling facilities within the State ..." Further, 06-096 CMR 409.1(A) defines a *processing facility* as "...any land area, structure, equipment, machine, device, system, or combination thereof, other than licensed incinerators, that is operated to reduce the volume or change the chemical or physical characteristics of solid waste. Processing facilities include but are not limited to facilities that employ shredding, baling, mechanical and magnetic separation, and composting or other stabilization techniques to reduce or otherwise change the nature of solid waste." Concurrently, the Department also found that 38 MRSA §1303-C(39) defines *treatment* as "...any process, including but not limited to incineration, designed to change the character or composition of any hazardous waste, waste oil or biomedical waste so as to render the waste less hazardous or infectious." The Board agrees that while *processing* refers to solid waste and *treatment* refers to hazardous waste, waste oil or biomedical waste, the terms are synonymous in that the waste is undergoing some form of physical, chemical, biological or stabilization transformation. Any distinction between the two terms is administrative to distinguish between the types of waste being handled, not the actions of converting, processing, treating or transforming the waste. Additionally, while the Board agrees that designating treated biomedical waste as "special waste" does not translate into the waste being "waste generated within the State" and eligible for disposal at the Juniper Ridge Landfill, treated biomedical waste is most appropriately managed by landfilling, as noted in Section 4(A) above.

The Board also finds that 38 MRSA §1310-N(11) states, in part, "...a solid waste disposal facility owned by the State may not accept **waste** that is not **waste** generated within the State." [emphasis added]. The Board finds that the language in the statute makes no distinction between solid, special, hazardous or biomedical waste, further supporting the Department's finding that the treated waste is in fact "waste generated within the State."

With respect to appellants' commerce clause argument, the Board finds that the Commerce Clause is not implicated here. The Board finds that because the Juniper Ridge Landfill is owned by the State and the State is a "market participant," the State may ban importation of out-of-state waste without running afoul of the commerce

242 b STATE OF MAINE, ACTING THROUGH THE 9 APPEAL OF SOLID WASTE
 STATE PLANNING OFFICE) LICENSE
 OLD TOWN, PENOBSCOT COUNTY, MAINE) FINDINGS OF FACT
 TREATED BIOMEDICAL WASTE) AND ORDER
 #S-020700-WU-AJ-N) (DENIAL)

clause of the U.S. Constitution. However, given the Board's finding that the waste is generated within the State, the Board need not reach the Commerce Clause argument.

The Board also finds that the license approving disposal of the treated waste at the Waste Management Landfill has expired. Additionally, while Waste Management has submitted an application for the ongoing disposal of treated waste from the AHR facility, the Department is still reviewing that application and has not taken final agency action on the application. Finally, the Department's approval to dispose of waste at one facility does not preclude approval of disposal of the same waste at another facility, provided that all applicable standards are met.

Finally, the Board finds that the request by the State Planning Office to dispose of the waste generated by AHR was submitted to the Department on October 13, 2009. Final agency action on the application occurred on June 30, 2010, over eight months later. The statutory timeframe for processing such applications is ninety days. The record reflects that interested parties were informed of the appropriate means to participate in the application review process and, in fact, did so on several occasions. The Board finds that the Department appropriately processed the application in accordance with the provisions of 06-096 CMR 2, that the Department's review was thorough and complete and that the interested parties were afforded adequate opportunity to comment during the review process.

6. ALL OTHER

All other Findings of Fact remain as set forth in Department Order #S-20700-WU-AJ-N.

BASED on the above Findings of Fact, the Board makes the following CONCLUSIONS:

1. The appellants have standing, are aggrieved and have made a timely appeal of the Department Order.
2. The appellants have submitted no new or additional information or arguments that would warrant vacating the Department's decision or modifying the approval in part.
3. All other conclusions remain as set forth in Department Order #S-20700-WU-AJ-N.

THEREFORE, the Board denies the appeals by Mary Dolan, Ed Spencer, Chuck Leithiser and the Juniper Ridge Landfill Advisory Committee to vacate or modify in part Department Order #S-20700-WU-AJ-N and AFFIRMS Department Order #S-20700-WU-AJ-N.

DONE AND DATED AT AUGUSTA, MAINE, THIS 2nd DAY OF DECEMBER, 2010.

DRAFT

STATE OF MAINE, ACTING THROUGH THE 10 APPEAL OF SOLID WASTE
STATE PLANNING OFFICE) LICENSE
OLD TOWN, PENOBSCOT COUNTY, MAINE) FINDINGS OF FACT
TREATED BIOMEDICAL WASTE) AND ORDER
#S-020700-WU-AJ-N) (DENIAL)

282 c

BY: _____
Susan M. Lessard, Chair

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

Date of initial receipt of application: October 13, 2009

Date of application acceptance: October 28, 2009

Date filed with Board of Environmental Protection: June 30, 2010

Date of initial receipt of appeals: July 28, 2010

Date of appeal with Board of Environmental Protection: December 2, 2010

282 d.